SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. [illegible]

IN ADMIRALTY.

THE ERIE CANAL BOAT [illegible], her tackle, &c., and THE CANAL BOAT "WILLIAM WORDEN," her tackle, &c.; CHARLES E. WAGER,

Claimant and Appellant,

against

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, RHODE ISLAND, and SECURITY INSURANCE COMPANY OF NEW HAVEN, CONNECTICUT,

Libellants and Appellees.

BRIEF ON BEHALF OF CLAIMANT AND APPELLANT ON APPEAL FROM THE U. S. CIRCUIT COURT [illegible] N. Y.

[illegible]

[illegible]

[illegible]

[illegible]

point, and has not been overruled, but, on the contrary, has been cited by the learned Justice Blatchford in his opinion in the case of the "Williamson" and approved.

The motion to dismiss the appeal should be denied.

Respectfully submitted,

J. A. HYLAND,
Proctor for Claimant and Appellant,
No. 45 Broadway,
N. Y. City.

FILED.
FEB 19 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 224.

IN ADMIRALTY.

THE STEAM CANAL BOAT "SYDNEY," her Engines, &c., and THE CANAL BOAT "WILLIAM WORDEN," her Tackle, &c., CHARLES E. WAGER,

Claimant and Appellant,

against

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE RHODE ISLAND, and SECURITY INSURANCE COMPANY OF NEW HAVEN CONNECTICUT,

Libellants and Appellees.

BRIEF IN BEHALF OF CLAIMANT AND APPELLANT ON APPEAL FROM JUDGMENT OF CIRCUIT COURT FOR S. D. OF N. Y.

HYLAND & ZABRISKIE,
Proctors for Claimant and Appellant,
No. 45 Broadway,
New York City, N. Y.

C. G. Burgoyne, 146-150 Centre Street, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 224.

The Steam Canal-boat "Sydney," her Engines, &c., and the Canalboat "William Worden," her Tackle, &c., CHARLES E. WAGER,
Claimant, Appellant,

vs.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY, of Providence, Rhode Island, and the SECURITY INSURANCE COMPANY, of New Haven, Connecticut.

In Admiralty.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF CLAIMANT AND APPELLANT.

Statement of the Case.

This suit was brought in the District Court of the United States for the Southern District of New York by the Providence Washington Insurance Company, of Providence, Rhode Island, and the Security Insurance

Company, of New Haven, Conn., against the canalboat "William Worden" and the steam canalboat "Sydney," to recover the value of a cargo of wheat shipped inboard the canalboat "William Worden" at Buffalo, N. Y., on the 17th day of May, 1883, and consigned to Armour, Plankinton & Co., at the port of New York, N. Y.

The cargo was lost while in transit inboard the boat "Worden" on the 29th day of May, 1883, in the Hudson River, at Esopus Island. The boat "William Worden" was being navigated by the steam canalboat "Sydney," the steam canalboat "Sydney" pushing the boat "Worden." While thus being navigated the boat "Worden" grounded on the shore of Esopus Island and was sunk, and the cargo, which was insured by the libellants, thereby became nearly a total loss. The District Court dismissed the libel and the libellants appealed; the Circuit Court reversed the District Court and decreed that the libellants recover $8,252.57, from which the claimant and appellant appealed to this Court.

The Parties to the Affreightment Contract.

The claimant and appellant Charles E. Wager was the master and owner of the canalboat "William Worden" and also of the steam canalboat "Sydney" at the time of the making of the affreightment contract and the insurance of said cargo by the libellants, and was also the owner of said boats at the time of the sinking of said boat "Worden" and the loss of said cargo.

Henry Morse and Alanson Morse, composing the firm of H. Morse & Co., were doing business at Buffalo as intermediaries, for a commission, between boatmen and shippers of grain, in procuring cargoes of grain to be shipped at Buffalo and consigned to New York and ports on the line of the Erie Canal.

W. Meadows was a shipper at Buffalo, doing business as agent for owners of cargoes to be shipped from Buffalo to New York, and was the shipper of the cargo in this instance.

Armour, Plankinton & Co. were grain merchants having their office and place of business at New York City, and were the consignees of the cargo of grain in question.

On or about the 17th day of May, 1883, the claimant and appellant Charles E. Wager, master and owner of the boat "William Worden," having said boat in the port of Buffalo ready to engage in the transportation of cargo to New York, applied to the said firm of H. Morse & Co. and requested that firm to procure a cargo for transportation in said boat to New York.

Thereupon said Morse & Co. made application to said W. Meadows for a cargo of wheat to be transported in the boat "William Worden," and took an order for said cargo of wheat from said Meadows, to be shipped inboard the boat "William Worden" to New York. Nothing was said at that time with reference to insurance. No request was then made by said Meadows to Morse & Co. to get the cargo insured. It was assumed only by W. Meadows that Morse & Co. would get the cargo insured under the general course of business.

Mr. Meadows testifies: "Q. What transaction did you have with them—Morse & Co.? A. Morse & Co.? I don't know. I can't recollect just now the exact manner in which this particular boatload of grain was shipped, but the ordinary way would be I would either go to Morse & Co., who had boats, or they would come to me, having the property to ship, and we would agree upon the rate of freight for carrying that load of wheat to New York. After that agreement was made Mr. Morse would go to my office and get an order for the load of wheat. At the time of getting the order my man—my bookkeeper—who writes the order, will instruct him where to insure it" (Record, p. 19).

The cargo was therefore taken in the ordinary course of business in the manner in which other cargoes were taken, it being a transaction which was conducted in the same manner that all other transactions of the kind were being conducted between the two offices, that is, between H. Morse & Co., intermediaries, and W. Meadows, the shipper.

The documentary evidence in the case contains the entire contract of affreightment between the shipper and the carrier, and the entire contract of insurance between the insurance companies and the carriers.

The following exhibits show the manner in which the insurance contract was made, upon which this suit is based, and under which the cargo of wheat was insured while in transit from Buffalo to New York inboard the boat "William Worden," and the affreightment contracts between the claimant and appellant Wager and H. Morse & Co., the intermediaries, and W. Meadows, the shipper.

Every spring, before the opening of canal navigation, for the purpose of procuring business, the Providence Washington Ins. Co. and the Security Ins. Co., the libellants herein, by their agents, were accustomed to deliver in Buffalo, to intermediary firms or brokers, such as the firm of H. Morse & Co., blank open or running cargo policies, which run for the season of navigation.

Pursuant to this custom, in the spring of the year 1883, before this cargo was shipped on board of the canalboat "Worden," Worthington & Sill, general agents of the Providence Washington Ins. Co. and the Security Ins. Co., the libellants, delivered to H. Morse & Co. the open or running cargo policy, which, with other clauses and covenants not pertinent to the issues herein, contained the following covenants:

UNIFORM CANAL CARGO POLICY.

THE NEW ENGLAND UNDERWRITERS,

THE SECURITY INSURANCE CO.

Of New Haven, Conn.,

THE PROVIDENCE WASHINGTON INS. CO.

Of Providence R., I.,

Each acting and contracting for itself, and not one for the other, for the true performance of the premises, each company for its own part only, which is one-half of all liability accruing under this policy,

BY THIS POLICY OF INSURANCE,

on account of H. Morse & Co., for whom it may concern:

Do insure the several persons, whose names are hereafter endorsed hereon as owner, advancer, or common carrier on goods, wares, merchandise or country produce, on his own boat, or boats belonging to others, loaded on commission or chartered.

From place to place, as endorsed hereon, or in a book kept for that purpose, for the several amounts, at the rate, and on the goods, wares, merchandise or country produce, as specified in the said endorsement.

No risk considered as insured under this policy until said endorsement is approved and signed by these companies, or their duly authorized agents, at

, unless with special agreement with the companies and endorsed hereon."

This open policy shows that it insures " on account of H. Morse & Co., for whom it may concern, the several persons whose names thereinafter endorsed thereon or in a book kept for that purpose as owner, advancer or common carrier on goods, wares, merchandise or country produce on their own boat or boats belonging to others loaded on commission or chartered" (Record, p. 9, Claimant's Exhibit A).

Before this cargo of grain was put inboard the "William Worden," and after the aforesaid order for the cargo of grain was taken by H. Morse & Co. from W. Meadows, H. Morse & Co. applied to the libellants' agents for an insurance on the said cargo under the terms of the above set forth open or running insurance policy.

That is, H. Morse & Co., before the cargo was loaded inboard the boat "Worden," applied to the libellants, through their general agents Worthington & Sill, to insure the cargo of grain while in *transitu* inboard the boat "Worden," in writing as follows:

WORTHINGTON & SILL,

GENERAL AGENTS

NEW ENGLAND UNDERWRITERS' CANAL INSURANCE.

Office, No. 48 Main Street and 10 Dayton Street,
Buffalo, N. Y.

(Copy.)

Insurance is wanted by Morse & Co. Loss, if any, is payable to do. or order on wheat inboard cargo on boat "Wm. Worden."

$9,875 from Buffalo to New York.

Rate cts. is $

Total premium, $

Buffalo, May 17, 1883.

H. MORSE & Co.,
Applicant."

(Record, p. 16, Claimant's Exhibit B).

On receipt of this application Worthington & Sill issued and delivered to H. Morse & Co. a certificate of insurance as follows :

" Providence Washington Ins. Co., Providence, R. I.
Security Ins. Co., New Haven, Conn.

NEW ENGLAND UNDERWRITERS,

INLAND MARINE DEPARTMENT,

WORTHINGTON & SILL, Gen'l Agents, Buffalo, N. Y.

CANAL CARGO CERTIFICATE.

No. 772. $9,875.

This certifies that H. Morse & Co. insured under and subject to the conditions of policy No. 772 (which is above set forth), issued by the New England Underwriters, in the sum of ninety-eight hundred seventy-five dollars, in board cargo of boat " Wm. Worden."

On wheat, $9,875 at and from Buffalo to New York to

Loss (if any) payable to assured or order and return of this certificate.

This certificate of insurance is not valid until countersigned by the authorized agents for this company at Buffalo, N. Y.

Buffalo, N. Y., May 18th, 1883.

WORTHINGTON & SILL,
General Agents.

[Written across face in red ink :]

" Received, New York, June 26th, 1883, from New England Underwriters ninety-two hundred eleven $\frac{75}{100}$

dollars in full for all loss and damage under this certificate, which is hereby surrendered and annulled.

$9,211.75.

ARMOUR PLANKINTON,
WHITLOCK.

[Endorsed :] H. Morse & Co."

(Record, p. 13, Libellant's Exhibit No. 2.)

Upon the delivery of said certificate of insurance, Worthington & Sill endorsed on the book kept for that purpose : " H. Morse & Co., boat, ' Wm. Worden,' from Buffalo to New York, $9,875, rate 15 cents, premium $14.82, wheat" (Record, p. 48).

The said endorsement, made in the book described, was made in accordance with the terms of the open or running policy above referred to, which says : " From place to place, as endorsed hereon, or in a book kept for that purpose, for the several amounts, at the rate and on the goods, wares, merchandise or country produce, as specified in the said endorsement" (Record, p. 10).

After the aforesaid order for the said cargo of grain for the boat " William Worden " was procured, as above stated, from W. Meadows by Morse & Co., and before the cargo was loaded in the boat " Worden " the foregoing certificate of insurance was delivered by the libellants by the hand of Worthington & Sill, their general agents, to H. Morse & Co. This was done because it was necessary to insure the cargo before it was loaded in-board, so that any loss would be covered which might happen during the time the cargo was being transferred from the elevator into the boat, as well as while *in transitu*.

Says William Meadows : " That is a part of the whole contract. Morse & Co. go down and make their application for insurance, and when the boat is loaded, or before it is loaded, the certificate is sent up to my office, and when the bill of lading is signed, as far as my party is concerned, the contract is consummated. The bill of lading is signed by Morse & Co., and a copy is signed by myself" (Record, p. 19).

The bill of lading shows that it was not only signed by Morse & Co., but was also signed by the claimant, Charles E. Wager. *This is important to notice*, because the learned Circuit Judge found as a fact that the original bill of lading was not signed by the claimant The bill of lading shows that the claimant did sign it.

Q. " When the bill of lading is brought to you is any other paper brought? A. The insurance certificate is either brought at that time or before. We usually require them before, so that we know that the boat is insured before she is loaded, or by the time she is loaded" (Record, p. 19).

All the foregoing steps were preliminary to taking in-board the boat "Worden" the cargo of grain. That is, the claimant and appellant Wager applied to H. Morse & Co. to get him a cargo. Thereupon, H. Morse & Co. applied to W. Meadows, and took a cargo of what is called "five-cent wheat," that is, a cargo of wheat to be transported from Buffalo to New York for a freight of five cents per bushel. Then the claimant and appellant Wager asked Morse & Co. to get the cargo insured for his benefit, whereupon H. Morse & Co. applied under the foregoing open or running policy to the insurance company, the libellant and appellant, and received the foregoing certificate of insurance, which they endorsed in blank, and the cargo of grain having been loaded in-board the boat "Worden," and the number of bushels taken in-board the boat having been ascertained by weighing thereof, H. Morse & Co. endorsed the said certificate of insurance in blank, and said claimant and appellant Wager and H. Morse & Co., through their agents, signed and delivered to W. Meadows the affreightment contract as follows:

" No.

[Vignette.]

Buffalo, May 17, 1883.

Shipped by W. Meadows, in apparent good order, on board the canalboat "Wm. Worden," of Morse, whereof is master, the following described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill. Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock P. M.), after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days as above specified, until the cargo is fully discharged. And it is agreed between the carriers and shippers and assigns that in consideration, especially of the rate of freight hereon named, the said carriers have supervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received inboard and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or carrier, or deficiency in the cargo from quantity as hereon specified, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating exceeding five bushels for each one thousand bushels.

The freight, charges and demurrage payable to as directed below or order, at place of destination, who is the only party authorized to collect the same, and whose receipt shall be in full for all demands on this cargo of bill of lading.

In witness whereof, the said master of said boat hath affirmed to two bills of lading, one marked 'Original' and one marked "Duplicate," of this tenor and date, one of which being accomplished the other to stand void.

7,900 bu. No. 2 red wheat, ex cargo sch. "R. Hallaran."

Freight to New York, five (5) cents per bu.

Advanced charges, $200.

H. Morse & Co.,
Per C. E. Wolfe.
C. E. Wager.

(Seventy-nine hundred bushel.)

[In margin :] Armour, Plankinton & Co., New York.

The freight charges and demurrage, to the amount of $516.94, are payable by check to the order of the National Bank of the Republic, in New York, such check to be delivered to E. B. Brooke & Co. for such bank ; the balance is payable to said E. B. Brooke & Co., who is the only party authorized to collect the same, whose receipts shall be in full for all demands therefor.

(New).

(Eb. 28).

Printed across the face in red ink the word "Original."

[Endorsed :] Armour, Plankinton & Co., Whitlock.

Record, p. 8, Libellants' Exhibit 1.

This completed the contract of affreightment between the shipper, W. Meadows, and H. Morse & Co. and Charles E. Wager, the common carriers, and Armour, Plankinton & Co., the consignees, and also the insurance contract on the cargo between the libellants and H. Morse & Co., for whom it might concern.

Thereupon W. Meadows, before the boat "Worden" started from Buffalo with the cargo in-board, forwarded the aforesaid affreightment contract or bill of lading, with the aforesaid certificate of insurance attached thereto, to New York, to Armour, Plankinton & Co. (Record, pp. 20–21).

The Collateral or Sub-Affreightment Contract between H. Morse & Co. and Charles E. Wager.

Before Capt. Wager started the said boat "Worden" from Buffalo with her cargo, pursuant to the above affreightment contract, he needed money to pay the charges for elevating and weighing and trimming the grain in his boat, to pay the lake charges which were owing and still a lien upon the cargo of grain for transporting thereof on the lakes from Chicago to Buffalo, to pay the premium for insuring the grain while *in transitu* in his boat from Buffalo to New York, under the policy above set forth, and to pay his running expenses to New York. Under the custom at Buffalo, in shipping grain from Buffalo to New York, as in this case, the intermediary men or brokers advance all the money necessary to forward the grain on from Buffalo to New York. In this case H. Morse & Co. advanced all the money which the claimant and appellant Charles E. Wager needed, as above stated, to proceed on his voyage before he started the boat.

That is, H. Morse & Co. not only obligated themselves as joint common carriers with the claimant and appellant Charles E. Wager, by signing the foregoing affreightment contract, but in addition thereto advanced all the above said money necessary to enable Capt. Wager to take the cargo of grain to New York.

Therefore, before the claimant Charles E. Wager started with the said cargo, he settled with H. Morse & Co. and secured them against loss as common carriers, and for the money which they had advanced and for their commission, in the following way: H. Morse & Co. kept a book account with the boat "William Worden" for this load of grain, and charged in the book to the claimant Wager the following items:

Insurance premium	$14 82
Commission	19 75
Cash	34 74
William Meadows, the shipper	200 00
Alanson Morse	240 26
Trimming	9 87
Total	$519 44

The item of $200 to William Meadows was money paid Mr. Meadows to pay the lake charges for transporting said cargo of grain from Chicago to Buffalo. The item of $240.26 to Alanson Morse was money which the captain paid out of his freight to Alanson Morse on account of the purchase price of his boat. The item of cash of $34.74 was money which the captain retained to pay his expenses along the canal after leaving Buffalo. The item of $9.87 for trimming was to pay the charges for trimming the cargo in the boat while the cargo was being taken on, and the item of $19.75 was the commission of five per cent. on the amount of the freight paid to H. Morse & Co. for their services in getting the load and in advancing the money, and the $14.82 was the premium paid by H. Morse & Co. to Worthington & Sill, the agents of the libellant, for insuring the cargo.

The foregoing sum of $519.44 the captain receipted for on account of his freight on the books of H. Morse & Co. on the settlement between H. Morse & Co. and the captain, after taking on the cargo and after delivering a bill of lading to the shipper, W. Meadows (Record, p. 32).

That is, to secure H. Morse & Co. for the aforesaid advancement, and also to secure H. Morse & Co. for having guaranteed, as common carriers, the affreightment contract, by signing the original affreightment contract as common carrier with Charles E. Wager, the claimant and appellant Charles E. Wager signed and delivered to H. Morse & Co. the collateral or sub-affreightment contract as follows (Claimant's Exhibit E). This contract is dated one day after the contract with Meadows:

No.

BUFFALO, May 18, 1883.

Shipped by H. Morse & Co., in apparent good order, on board the canal-boat "William Worden," of Syracuse, whereof Charles E. Wager is master, the following described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin, in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill.

Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before 4 o'clock P. M.), after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days as above specified, until the cargo is fully discharged. And it is agreed between the carriers and shippers and assigns that in consideration especially of the rate of freight hereon named, the said carriers having supervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received inboard and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or carrier or deficiency in the cargo from quantity as hereon specified to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating, exceeding five bushels for each one thousand bushels.

The freight charges and demurrage to the amount
of $ are payable by check to the order of
, New York, such check
to be delivered to for
such bank, the balance payable to said
, who is the only party authorized to
collect the same, whose receipt shall be in full for all demands therefor.

Tolls on this cargo having been advanced by H. Morse & Co., if refunded, must be to them or to their order.

In witness whereof, the said master of said boat hath affirmed to two bills of lading, one marked "Original," and one marked "Duplicate," of this tenor and date, one of which being accomplished, the other to stand void.

7,900 bushels of wheat.

Freight to New York, per bushel, 5	$395 00
Captain's advance	319 44

On safe delivery, E. B. Brooke & Co., collect
as above and pay Captain $75 56
Hold subject to our draft $319.44.

H. Morse & Co.,
Fero.

Care of E. B. Brooke & Co.,
New York.

J. W. Schlehr,
Dep. Clerk.

[Endorsed:]

Insurance	$14 82
Commission	19 75
Trimming	9 87
Cash	34 74
H. Morse	240 26
	$319 44

(Record p. 16.)

On the back of the above bill of lading is endorsed the money advanced Capt. Wager by H. Morse & Co. These are the same items which were charged in the book kept by H. Morse & Co. at the time of the settlement between H. Morse & Co. and Charles E. Wager, above set forth, except the $200 advanced to W. Meadows to pay the back lake charges against the cargo.

By this collateral or sub-affreightment contract the claimant and appellant Wager was consigned by H. Morse & Co. to E. B. Brooke & Co., New York, and by the signing and delivery thereof the claimant and appellant Charles E. Wager acknowledged the receipt of the said advances and agreed to permit the same to be deducted out of the freight to E. B. Brooke & Co., at New York, for the benefit of and to pay H. Morse & Co. the said advances.

It is seen, therefore, that by this collateral or sub-affreightment contract H. Morse & Co. secured themselves by the agreement on the part of the claimant and appellant Charles E. Wager that he would transport said cargo to New York for said five cents per bushel, and also that out of said five-cent freight he would pay back to H. Morse & Co. the moneys which they had advanced on account of his freight, as well as their commission charges for securing the cargo.

The manner in which H. Morse & Co. secured the $200 advanced to pay back charges on said grain, and for the benefit of the owners of the grain, and not on account of the freight of the claimant and appellant Charles E. Wager.

As shown above, H. Morse & Co., when said cargo was secured, advanced to W. Meadows, the shipper, $200, to pay freight and charges already incurred against this cargo of grain for transporting it from Chicago to Buffalo. This money was advanced, not for the benefit of the claimant and appellant Charles E. Wager, nor was it advanced on account of his freight. It was advanced for the benefit of the owners of the cargo, and H. Morse & Co., under the custom of the trade, in order to procure the business of intermediary men or scalpers, advanced the same. Hence, in order to secure themselves for this advance, as well as for the advance they had made the claimant and appellant Wager on account of freight, H. Morse & Co. had endorsed on the original bill of lading, or affreightment contract, between themselves and Capt. Wager as carriers, and W. Meadows as shipper, the following endorsement:

"The freight charges and demurrage, to the amount of $516.94, are payable by check to the order of the National Bank of the Republic in New York, such check to be delivered to E. B. Brooke & Co. for such bank; the balance is payable to said E. B. Brooke & Co., who is the only party authorized to collect the same, whose receipts shall be in full for all demands therefor" (Record, p. 9).

That is, the consignees of the grain, when they accepted the cargo at New York under the said original bill of lading or affreightment contract, were instructed by the above said indorsement thereon to pay $516.94, advanced by H. Morse & Co., as shown above, out of the purchase price of said grain by checks to the order of National Bank of the Republic, and deliver the same to E. B. Brooke & Co., which E. B. Brooke & Co. were to accept as cash. By this method H. Morse & Co. were protected from any danger of loss of the money advanced.

Again, in order to protect themselves against their own consignee agent, E. B. Brooke & Co., at New York, H. Morse & Co., at the date the boat left Buffalo with said cargo, forwarded through their bank at Buffalo, to New York, upon E. B. Brooke & Co., a draft as follows:

H. MORSE & CO.

$519.64. Buffalo, N. Y., May 18, 1883.

Pay to the order of J. W. Bridgman, cashier, five hundred and sixteen $\frac{94}{100}$ dollars, fifteen days after date; or if you shall sooner collect freight and charges on canalboat "William Worden," then pay said sum immediately thereafter. A bill of lading of such boat is placed in your hands, bearing date May 17, 1883, for the express purpose of enabling you to meet this draft.

H. Morse & Co.,
J. Fero.

To E. B. Brooke & Co., New York.
Protest for non-acceptance only.

Printed across the face in red ink :

* * * accept this draft and agree to pay the amount named as therein directed, at the * * *

(Signed) E. B. Brooke & Co.

(Record, p. 16).

This last above-mentioned draft E. B. Brooke & Co. were enabled to meet by the check drawn to the order of the National Bank of the Republic in New York, which the consignee owners of the cargo were instructed to pay E. B. Brooke & Co. by the aforesaid endorsement on the original bill of lading or affreightment contract.

The insurance premium was paid by the claimant and appellant Charles E. Wager, to the libellants, by his agents H. Morse & Co., before the loss of the cargo happened.

Says Henry S. Sill, one of the agents for the libellants :

" Q. Look at Exhibit C and see whether that shows whether the premium was paid or not ? A. Yes, sir."

" Q. When was it paid ? A. It was paid May 23."

" Q. Do you know by whom ? A. By H. Morse & Co." (Record, p. 49).

The loss happened May 29th. The insurance premium was therefore paid by H. Morse & Co. to the libellants six days before the loss occurred.

The method of making the affreightment contract and getting the cargo insured, above set forth, has been in vogue for the last twenty-five years or more, and by it every one is made secure.

First. Before the cargo is taken from the grain elevator money is advanced to pay the charges which have already accrued thereon for transporting it from Chicago on to Buffalo. This is done, as shown in the above case, by the intermediary men or brokers. It was done in this case when H. Morse & Co. advanced $200 to W. Meadows to pay such charges.

SECOND. In order that the cargo of grain should be insured against accident after it left the elevator, an insurance contract was made by H. Morse & Co. in which the libellants agreed to insure, on account of H. Morse & Co., for whom it might concern, the several persons whose names were endorsed thereon, or in a book kept for that purpose, as owner, advancer or common carrier, and the names endorsed thereon were H. Morse & Co.; and said certificate, certifying such insurance, was endorsed in blank H. Morse & Co. and delivered to W. Meadows, who was acting as agent of the owners of the cargo, thereby ordering in case of loss or damage to said cargo, the insurance companies, the libellants herein, to pay such loss or damage to the holder of such certificate.

THIRD. To further indemnify the owners of said cargo that the claimant and appellant Charles E. Wager would transport said cargo from Buffalo to New York and safely deliver the same, H. Morse & Co. personally guaranteed such contract and made themselves, for the purpose of such guaranty, joint common carriers with the claimant and appellant Charles E. Wager, by signing, with the said claimant and appellant, the original affreightment contract or bill of lading given by W. Meadows as shipper, and consigning the said cargo to Armour, Plankington & Co.

FOURTH. In order to indemnify and hold H. Morse & Co. harmless against loss, Charles E. Wager signed the collateral or sub-affreightment contract, in which he agreed with H. Morse & Co. to transport said cargo from Buffalo to New York at the same rate of freight which said H. Morse & Co. and the said Charles E. Wager had agreed to transport it for in the original affreightment contract or bill of lading with W. Meadows. While, therefore, H. Morse & Co. had bound themselves with W. Meadows by signing the original affreightment contract with the claimant and appellant Charles E. Wager to transport the cargo from Buffalo to New York for five cents per bushel, they, H. Morse & Co., at the same time secured an affreightment contract from the claimant and appellant Charles E Wager, in which he agreed with them that he would transport the cargo for the same price from Buffalo to New York.

FIFTH. Under the foregoing original affreightment contract, the owners of the cargo were protected by having bound H. Morse & Co. and Charles E. Wager, by contract, to transport the cargo safely from Buffalo to New York, and, under the collateral or sub-affreightment contract, H. Morse & Co. had protected themselves by having bound Charles E. Wager to transport the cargo for the same price from Buffalo to New York. Hence, in case of loss, the claimant and appellant Charles E. Wager would be the only one who would have to suffer. He, therefore, was the person who was most concerned in securing insurance, because he had no redress over in case of loss against any third party.

Under the method, as above set forth, of insurance, H. Morse & Co., as intermediary men or brokers doing business for boatmen for a commission, secured the above set forth open or running policy for the season, in which the libellants agreed to insure "on account of H. Morse & Co., for whom it may concern, the several persons whose names were thereafter endorsed thereon, as owner, advancer, or common carrier." This insurance was secured by H. Morse & Co. at the special instance and request of Charles E. Wager, and for his benefit, as well as for their own, and the premium was paid in the first instance by H. Morse & Co. to the insurance company and charged by H. Morse & Co. against the claimant and appellant Charles E. Wager, and an order taken from Charles E. Wager upon the consignees E. B. Brooke & Co. to pay such money out of his freight back to H. Morse & Co.

SIXTH. While Charles E. Wager and H. Morse & Co. were insured against loss, in case of damage or loss of the cargo, they being liable therefor as common carriers to the owners, the owners, in order to protect themselves, and secure the loss, in case the insurance company had to pay it, required that the certificate insuring Charles E. Wager and H. Morse & Co. be delivered to them, so that they could collect such insurance from the company directly, and apply it to pay the claim which they would have against Charles E. Wager and H. Morse & Co. in case the cargo was lost and not insured.

It is further to be borne in mind that up to the time of the loss of this cargo no money had been advanced by the owners of the cargo to pay insurance premiums or any other expenses; all the money that had been paid was paid by H. Morse & Co. The shipper and consignee, owners of the cargo, that is, W. Meadows and Armour, Plankinton & Co., paid no money, and were to pay no money until the cargo was safely transported to New York. Hence, it cannot be said that the owners of the cargo paid any premium or in any way became responsible for any premium. The best evidence of this is that, in case the premium had not been paid in this case, the facts do not show that the libellants in this action could have brought a suit against the owners of the cargo therefor, because there is no evidence in the case that H. Morse & Co. acted for or in behalf of Armour, Plankinton & Co., or the owners of the cargo, in making the contract of insurance. They acted wholly for themselves and for the claimant and appellant Wager.

The evidence of Henry Morse, to whom the insurance policy was issued, and of Henry S. Sill, the agent of the libellants, who issued the insurance policy, shows that when the insurance contract was made the libellants intended to insure the claimant Charles E. Wager, the captain of the boat "Worden," against loss as common carrier.

HENRY MORSE swears: "Q. Have you ever had any sonversation with insurance people with reference to this class of insurance, as to the persons known or intended to be secured by it? A. I have.

"Q. In connection with taking out policies, I mean? A. Yes, sir; *and it was understood that the captain of the boat was insured.*

"Q. Was it stated in substance to that effect? A. It was stated in substance to that effect.

"Q. Stated what? A. That the captain of the boat was insured" (Record, p. 34).

Again, says the same witness:

"Q. When you went to Worthington & Sill—which was the same day, wasn't it? A. Yes, sir.

"Q. And got this certificate, you were doing it pursuant to the contract you had just made with Meadows? A. Yes, sir; *and to protect ourselves and the captain.*

"Q. Now, will you be kind enough to tell me in what sense either yourself or the owner of the boat got the benefit of that insurance? A. With the understanding with the insurance company that ourselves, as common carriers, and the captain are protected when we take a policy from them.

"Q. Protected in what way? A. From any loss.

"Q. Protected against what? A. Protected against any loss that might occur while the cargo is in transit, after being insured, from Buffalo to New York or any other port" (Record, pp. 38, 40-41).

Henry S. Sill, one of the firm of Worthington & Sill, the general agents of the libellants who issued and delivered the open policy and certificate of insurance, swears:

"Q. In insuring in this way, receiving this application and making that entry in your policy book, do the company understand that the design is on their part to benefit anybody else besides Mr. Morse; do they understand that that was designed to protect the boat against loss, as the carrier of the goods, as well as Morse & Co.? A. Yes, sir" (Record, p. 51).

"Q. Do you understand, as a matter of fact, that the captains of the boats pay the premium that is paid to you to Morse & Co. for you? A. I understand that it comes from the captains—the premiums" (Record, p. 61)

The cargo having been lost on the 29th day of May, 1883, by a collision of the boat "Worden" with the shore of Esopus Island, the libellants paid the loss to Armour, Plankinton & Co. and H. Morse & Co., and took from them what purported to be subrogation receipts (Libellant's Exhibits No. 4 and No. 3), as found on pages 15 and 14 of the Record. That is, Armour, Plankinton & Co., on the 26th day of June, 1883, on receiving information that the cargo had been lost, presented the certificate of insurance above set forth, endorsed by H. Morse & Co. in blank to the insurance company, and thereupon on the same day the insurance company paid to Armour, Plankinton & Co. their loss, the sum of $9,211.75. Thereafter, on the 30th day of June, 1883, the insurance company, through their agents, Worthington & Sill, paid to H. Morse & Co. their loss, the sum of $520.

On payment of the losses as above set forth, the libellants brought suit against the steam canalboat

"Sydney" and the canalboat "Worden," alleging that the libellants did, by a certain insurance policy, insure and agree to indemnify against loss whilst in *transitu* Armour, Plankinton & Co., the owners of the cargo of wheat on board of the canalboat "Worden," and that in pursuance of the terms of said policy they had paid said loss, and that they were subrogated to the rights of Armour, Plankinton & Co. as against the said steamboat "Sydney" and canalboat "Worden," and that said loss had occurred and was brought about by and through the negligence of the persons in charge of and navigating said boats.

The claimant and appellant Charles E. Wager duly appeared and filed a claim and answer, and alleged therein that he was the person insured under said insurance policy, and that the loss which occurred to said cargo while in *transitu* which was paid by the libellants was paid for him and for his benefit, and to relieve him from his liability as common carrier under his affreightment contract, and that the said loss of said cargo was not occasioned by reason of any fault or negligence on his part or on the part of the persons in charge of and navigating said vessels.

The case came to trial in the District Court. No evidence was given on the question of negligence, each proctor urging that the burden of proof as to the question of negligence was upon the other under the pleadings, and at the same time virtually agreeing that the question involved in the case was simply one of insurance.

The learned District Judge found on the evidence that the only persons insured under the insurance contract were H. Morse & Co.; that Armour, Plankinton & Co. were not insured, nor was Charles E. Wager, the claimant and appellant. But that H. Morse & Co. intended to insure Charles E. Wager, but had failed to do so under the form of the contract. The learned District Court held that under the written contract of insurance the libellants agreed to insure on account of H. Morse & Co., for whom it might concern, the several persons whose names were thereafter endorsed thereon, or in a book kept for that purpose, as owner, advancer or common carrier (Record, p. 249).

"The certificate of insurance issued in this case does not contain the words 'on account of whom it may concern,' or any equivalent words, but the names of Morse & Co. only. The necessary construction of the original policy, with its conditions, is that, in order to make any particular transactions available under it, the names of the individuals of whose account any particular insurance under it is effected must appear by endorsement on the policy or by an entry made in the policy book. This condition of the policy is a perfectly lawful one, and, being clearly expressed, is controlling. In this case the name of Morse & Co. alone is entered in the policy book, without any such additional words as 'for whom it may concern,' nor are they described as agents. The certificate is in accordance with this entry, and is made payable to Morse & Co. or their order. There is no language that can be so extended as to include any other persons. Upon the written contract, therefore, 'the assured,' in the language of the policy, are Morse & Co. only. In such a case parol evidence is not conceivable to vary the written contract or to enlarge the interests of the persons directly assured" (Opinion of Judge BROWN, Record, pp. 250–251).

"The insurance effected by Morse & Co. was, as I have said, clearly shown by the evidence to have been intended as much for the benefit of Captain Wager as for themselves. It was effected upon his request and authority, and the premiums paid by Morse & Co. were charged against the captain and freight. Captain Wager was absolutely liable to Morse & Co. for this advance of premiums, whether the freight or insurance money should ever be collected or not" (Record, p. 251).

"He" (the claimant and appellant Wager) "is equitably entitled to the benefits of the policy, and hence entitled by an equity paramount to that of the insurers and as against Morse & Co. or their endorsees to have any moneys paid on account of the loss to either of them applied in discharge of his own obligation. Any voluntary settlement made by the insurers with either inures to his benefit as much as to theirs" (Record, p. 253). Under this construction of the insurance contract the learned District Court dismissed the libel.

The libellants and appellees thereupon appealed to the Circuit Court. On the trial of the case before the Circuit Court the learned Circuit Judge found that under the terms of the insurance contract Armour, Plankington & Co. were insured as owners, and H. Morse & Co. were insured as advancers and common carriers, and that Charles E. Wager was not insured. Thereupon the Circuit Court reversed the District Court, and entered a decree in behalf of the libellants against the claimant for $6,175.89 damages, with interest and costs.

The learned Circuit Judge reversed the District Court for the following reasons:

"The libellants rely purely upon subrogation. The cases consequently presents two questions: "First, whether upon the facts a cause of action existed in favor of Armour, Plankington & Co. against one or both of the vessels at the time of the payment to them of the loss by the libellants; and, second, whether the libellants stand by surrogation in the place of Armour, Plankington & Co. to enforce that cause of action. *If Armour, Plankinton & Co. were not entitled to the insurance, as between themselves and the libellants, under the policy and certificates, the libellants cannot recover*" (Opinion of Judge Wallace, Record, p. 220).

" The contract of insurance is found in the policy and certificate supplemented by such extrinsic evidence as may be properly received to explain but not to contradict their terms. The policy is a running or floating policy, intended to cover future shipments of goods or produce. Its phraseology respecting the persons and interests to be insured is somewhat equivocal, owing doubtless to the fact that the words ' on account of H. Morse & Co., for whom it may concern," were written into the printed form, adapted to insure all persons who might become parties to it by endorsing their names thereon. By its terms the voyage, the amount to be insured, the property and the rate of premium are to be described by an endorsement upon the policy or in a book kept for that purpose, such endorsement to be approved and signed by the libellants. It is to be read as though the libellants undertook to insure Morse & Co. for themselves and those whom they might represent in procuring insurance, and also undertook, at the request of Morse & Co., to insure any other persons having an interest as owners, advancers or common carriers whose names and interests should thereafter be endorsed upon the policy. When the names of Morse & Co. were inserted in it it was appropriate to meet the different classes of transactions which an insurance by them might represent. It was such as would enable them to effect an insurance in their own names when they had an interest in the risk as advancers or carriers, or to obtain insurance for the owner, advancer or carrier, and in his name if they desired or had no interest themselves. Upon the correct construction insurance effected in the name of Morse & Co. was to inure to the benefit of all concerned—*that is, for the benefit of all for whom they acted in obtaining insurance ;* and when insurance wss not effected in the name of Morse & Co., the name of the person to be insured, with a statement of his interest, was to be endorsed on the policy, and he would thereby become the assured.

Upon any other construction the words 'for whom it may concern' are nugatory. Insurance in the name of another might some time be desirable when Morse & Co. had no interest in the transaction other than thar of agent for procuring cargoes and insurance upon them for others for a commission.

"No endorsement was made upon the policy of the name of the person insured, but upon the application for insurance the memorandum of the property, the voyage, the amount of insurance and the rate were entered by the libellants in the book kept for that purpose, as recited in the certificate delivered by them to Morse & Co. The certificate and policy are to be read together, and, as read, form a contract between the libellants and Morse & Co. to insure the latter 'for whom it may concern.' This was an insurance for Armour, Plankinton & Co. to the extent of their interests as owners of the cargo, because the proofs show indisputably that Morse & Co. obtained the insurance at the request and for the protection of Armour, Plankinton & Co. It was also an insurance for the benefit of Morse & Co. to the extent of their interests as carriers and for advances" (Opinion of Judge WALLACE, Record, pp. 221–2).

"The proofs do not show that the interest of the carrier was intended to be insured by Morse & Co. when they applied for the insurance and procured the certificate. If, as was thought to be the fact by the District Judge, the premium was paid for the insurance by the claimant, that circumstance would be quite controlling to indicate an understanding between Morse and himself that his interest should be protected by the insurance" (Record, p. 224).

That is, the learned Circuit Judge finds that H. Morse & Co. intended to insure under the terms of the contract themselves as carriers, and Armour, Plankinton & Co. as owners. If the learned Circuit Judge had found that Charles E. Wager was also insured, he would have dismissed the libel, as appears from the opinion: "If the libellants were attempting to enforce a cause of action against the claimant for a breach of his obligations as a carrier, and if they had insured him as carrier as well as Morse & Co. and Armour, Plankinton & Co., it would seem very clear that they could not succeed. In such a case they would be attempting to reclaim moneys which they had agreed to appropriate in part for his indemnity against the very loss which had arisen—a fund which became his to an extent commensurate with his obligations as a carrier as soon as the loss took place" (Record, p. 224).

From this it follows clearly that the vital question in the case is one of insurance. If under the insurance policy the claimant and appellant Charles E. Wager was insured, then, no matter whether Armour, Plankinton & Co. and H. Morse & Co. were also insured or not, or whether H. Morse & Co. and the claimant were insured and Armour, Plankinton & Co. not, the libel should have been dismissed and the decree of the Circuit Court reversed and the decree of the District Court sustained.

Upon the foregoing statement of the case it is respectfully submitted that the learned Circuit Court made the following errors:

FIRST. The learned Circuit Judge erred in finding that Armour, Plankinton & Co. were insured under the terms of the insurance contract.

SECOND. The learned Circuit Judge erred in finding that Charles E. Wager, the carrier, was not insured under the terms of the insurance contract.

THIRD. The learned Circuit Judge erred in finding that the question of negligence was material in deciding the issues in the case.

After discussing the above errors, the question of jurisdiction of this Court will be considered.

FIRST.

A careful examination of the evidence and of the insurance contract in this case shows conclusively that Armour, Plankinton & Co. were not insured. Therefore, the libel must be dismissed, because it does not proceed upon the theory that the libellants have succeeded to any rights by subrogation except those of Armour, Plankinton & Co.

It will be observed that there is no evidence in the case which shows that there was any intention on the part of H. Morse & Co. to insure Armour, Plankinton & Co. as owners of the cargo at the time the certificate of insurance was issued. On the contrary, the evidence shows that it was the intention of H. Morse & Co. to insure themselves and Capt. Wager.

Again, the certificate of insurance does not show that Armour, Plankinton & Co. were intended to be insured. The form of the certificate indicates, and is proof, that it was given for the purpose of endorsing over to any person who shall become legally possessed of the bill of lading, the payment of the loss under the insurance policy of H. Morse & Co. and the captain of the boat, in case there was a loss to the cargo while *in transitu* inboard the boat "William Worden." In other words, the certificate of insurance, which was endorsed in blank by H. Morse & Co. and delivered to W. Meadows, and by W. Meadows forwarded with the bill of lading, was neither more nor less than collateral security, by the assignment of the payment of the loss, in case there was a failure on the part of the common carriers to deliver the cargo in accordance with the terms of the bill of lading.

But by going a step farther it will clearly be seen that Armour, Plankinton & Co. were not insured. Had Armour, Plankinton & Co. assigned the bill of lading which they received in this case from W. Meadows, and with it this certificate of insurance, which

Meadows received from H. Morse & Co., would there have been in this case any doubt but that the assignee of Armour, Plankinton & Co., holding the bill of lading and the certificate of insurance, endorsed in blank as in this case, could have collected the loss under said certificate of insurance from the libellants herein equally as well as Armour, Plankinton & Co.?

Moreover, it is evident that there was no need of insuring Armour, Plankinton & Co. in this case. H. Morse & Co. and Charles E. Wager being common carriers were liable to the owners of the grain for the full value thereof as insurers, and when they themselves insured the cargo for their own benefit, and endorsed over the payment of the loss, if any, to the owners of the cargo, they thereby secured the owners of the cargo and relieved themselves from liability in case of loss. The clause in the open policy, which reads "do insure, on account of H. Morse & Co., for whom it may concern, the several persons whose names are hereafter endorsed hereon as owner, advancer or common carrier," does not necessarily imply that the owner must be insured, except when H. Morse & Co. intended to have the owners insured when the certificate was issued. In this case H. Morse & Co. did not intend to have the owners insured at the time the certificate was issued, nor was it necessary. It was only necessary to insure the common carriers, who were H. Morse & Co. and Charles E. Wager, and then endorse their certificate of insurance, ordering the insurance company, in case of loss to pay the loss over to the owners of the cargo, and thereby relieve themselves, as above said, from liability as carriers.

SECOND.

Charles E. Wager and H. Morse & Co., the common carriers under the original bill of lading, were both insured, and were the only parties insured under the terms of the insurance contract herein.

It was held by the learned Circuit Court in this case that H. Morse & Co. were insured to the extent of their interest as carriers and for advances. Says the learned Court: "The certificate and policy are to be read together, and, so read, form a contract between the libellants and Morse & Co. to insure the latter 'for whom it may concern.' This was an insurance for Armour, Plankinton & Co. to the extent of their interest as owners of the cargo, because the proofs show indisputably that Morse & Co. obtained the insurance at the request and for the protection of Armour, Plankinton & Co. It was also an insurance for the benefit of Morse & Co. to the extent of their interests as carriers and for advances" (Opinion of Judge WALLACE, Record, p. 222).

That Charles E. Wager, under the proofs in this case, must have been insured is clear and palpable. The learned Circuit Court in his opinion in this case laid down the rule of law which controls in this case in the following language, the soundness of which cannot be questioned: "Although the general rule is that, if a policy insures the interest only of the person named in it, no other person can show that it was also intended to cover his interest, it is otherwise if the policy contains the phrase 'for whom it may concern;' and under such a policy the intention of the person who effects the insurance determines the application of the clause. The insurance effected by him insures all who have an insurable interest in the property to the extent of their interests, where there is a previous authority or subsequent ratification of an insurance obtained for them. This is so whether the intention of the person effecting the insurance is known to the insurer or not; and the persons whose interests are thus insured may sue upon the policy in their own names, and a recovery by one inures to the benefit of all, and bars a recovery by the others. The phrase ordinarily applies, however, only to those who are contemplated at the time of the insurance, and who had then an insurable interest in the subject-matter (1 Pars. Ins., 45; Hopper vs. Robinson, 98 U. S., 528; Henshaw vs. Mutual Safety Ins. Co., 2 Blatchf., 99; Hermann vs. Louisiana State Ins. Co., 7 La., 502; Duncan vs. Sun Ins. Co., 12 La. Ann., 486; Buck vs. Chesapeake Ins. Co., 1 Pet., 151; Rogers vs. Traders' Ins. Co., 6 Paige, 583.") (Opinion of Judge WALLACE, Record, pp. 222–3.)

Under the foregoing authorities, and by giving effect to the clause in the insurance policy in this case, "for whom it may concern," and under the facts in this case as proven, there can be no question at all as to the fact that Charles E. Wager was insured. Henry Morse, who effected the insurance, swears that he effected the insurance for the benefit of H. Morse & Co. and Capt. Wager. Henry S. Sill, the general agent of the insurance companies, who issued the open or running cargo policy, and the certificate of insurance to H. Morse & Co., swears that the insurance was for the benefit of the captain of the boat.

Charles E. Wager also signed the original bill of lading with Henry Morse & Co., and was therefore liable jointly as common carrier and had an insurable interest in the cargo as such; so that, under the above doctrine laid down by the Circuit Court, there can be no longer any question as to the insurance of the co-respondent, Charles E. Wager. All the conditions, which under the doctrine above laid down were required, were fulfilled. That is, at the time the insurance was effected, Charles E. Wager had an insurable interest as common carrier; when the insurance was effected H. Morse & Co., who effected the insurance, effected it for the benefit of Charles E. Wager at his request.

It is further to be observed in this connection that the evidence in this case is that there was no direct communication between W. Meadows and H. Morse &

Co. in which W. Meadows instructed H. Morse & Co. to insure the cargo. It appears in this case, and the evidence is, that W. Meadows assumed only that H. Morse & Co. would get the cargo insured, under the ordinary course of doing the business. That is all. But there is not a single word of evidence in the case which shows that there was any direction that H. Morse & Co. should get the cargo insured in the name of and for the benefit of Armour, Plankinton & Co., or the owners of the cargo. A careful examination of the evidence in the Sydney case will also show that there never was any direct request by Mr. Meadows to Morse & Co. to insure the cargo for the benefit of the owners or Armour, Plankinton & Co. When the evidence is carefully examined in that respect it will be seen that it was an assumption that Morse & Co. would get the cargo insured and that W. Meadows would require an endorsement of the certificate of insurance over to him before he would give a cargo for shipment; that is, only an assignment of the payment of the loss to the owners of the cargo in case there was a loss of the cargo while *in transitu.*

The learned Circuit Judge came to an erroneous conclusion as to the persons insured under the insurance contract, by reason of his error in the third and fourth findings of fact.

In the third finding of fact (Record, p. 219) the learned Circuit Judge found: "They (Morse & Co.) were applied to by the owner of the canal-boat "Worden" to procure him a cargo for New York. They thereupon applied to one Meadows, who was an agent for Armour, Plankinton & Co., for a cargo, and agreed with him to transport 7,900 bushels of wheat from Buffalo to New York on the boat "Worden" and to insure the same for a freight of five cents per bushel. Thereupon they entered into a contract with the owner of the "Worden," evidenced by a bill of lading in which they were described as shippers of the cargo, for transportation of the cargo to New York, and procured the certificate of insurance aforesaid and endorsed and delivered it to the agent for Armour, Plankinton & Co., and at the same time entered into a contract with him for the transportation of the cargo to New York, evidenced by a bill of lading *in which they described themselves as carriers and Armour, Plankinton & Co. as shippers.*"

Here, it will be observed, that the Circuit Judge is wrong in this respect. The bill of lading between Meadows and H. Morse & Co. and Charles E. Wager, which is found on pp. 8 and 9 of the Record, shows: first, that W. Meadows was the shipper, and not Armour, Plankinton & Co.; and, secondly, that H. Morse & Co. *and Charles E. Wager* were carriers, and Armour, Plankinton & Co. the consignees.

Again, in finding fourth (Record, p. 219), the learned Circuit Judge found: "At the time Morse & Co. executed and delivered the bill of lading (above referred to) to the agent of Armour, Plankinton & Co., the claimant, as master of the 'Worden,' also executed a duplicate bill of lading, describing himself as carrier, and delivered it to said agent"

This is also an error. As a fact the claimant and appellant Charles E. Wager executed no duplicate bill of lading. The only bill of lading which he executed with the shipper Meadows was the bill of lading above referred to, which he signed jointly with H. Morse & Co. and thereby became jointly with H. Morse & Co. a carrier.

These two errors of fact led the Circuit Court into an erroneous conclusion. The learned Circuit Judge assumed that H. Morse & Co. made a separate and distinct affreightment contract with W. Meadows, as agent of Armour, Plankinton & Co., and that that bill of lading was the one to which the insurance of the cargo related, and that the claimant and appellant Charles E. Wager was not a party to that affreightment contract;

that he afterwards delivered another bill of lading, which he signed.

If the learned Circuit Judge had found that the original bill of lading which H. Morse & Co. had signed was also signed by Charles E. Wager, and that H. Morse & Co. and Charles E. Wager were jointly bound as carriers under that bill of lading, and that that was the bill of lading to which the certificate of insurance was pinned, he would not have made the distinction of finding that the insurance policy insured H. Morse & Co. as carriers and did not insure Charles E. Wager, who was jointly liable as carrier with H. Morse & Co. and who had executed the contract at the same time with H. Morse & Co.

It will further be observed in this connection that the party who, under the course of business adopted in transporting cargoes from Buffalo to New York like the one in question, is liable for the damages in case of the loss of a cargo in *transitu*, and who, therefore, was the party who most needed insurance, was the claimant and appellant Charles E. Wager. He, with Morse & Co. had contracted with W. Meadows to transport the cargo to New York. That contract was made on the 17th day of May, 1883 (Record, p. 8). Thereafter, on the 18th day of May, 1883, the claimant and appellant Charles E. Wager signed a bill of lading in which H. Morse & Co. stated that they were shippers and Charles E. Wager carrier. In this bill of lading Charles E. Wager had become the sole carrier and agreed with H. Morse & Co. to transport the cargo safely to New York. Hence, in case of a loss of the cargo, no insurance having been secured, Meadows in the first instance would have a claim against Morse & Co. and Charles E. Wager for damages, and in case H. Morse & Co. paid any damages to W. Meadows for such loss, they would have under the second bill of lading a right of action against Charles E. Wager to make such loss good. Therefore, as above stated, Charles E. Wager was the person who should be insured in this case to protect himself against the loss which he must eventually stand unless there was an insurance on the cargo.

THIRD.

The question of negligence was not material:

First. Because the bill of lading in this case is what is called a clean bill of lading, that is, the common carriers, H. Morse & Co. and Charles E. Wager, signed a bill of lading or affreightment contract, in which they agreed to safely transport said cargo from Buffalo to New York without excepting the dangers of the seas or any other accident or contingency which might occur. Therefore, they were common carriers, with all the liability which attaches to common carriers; that is, if the cargo was not delivered, regardless whether the failure to deliver was owing to any fault on the part of the Captain or not, they were bound to make good any loss to the owners by failure to deliver.

Second. The libellants The Providence Insurance Company and the Security Insurance Company having paid the loss as one having occurred within the terms of the policy, waived the question of negligence, and are now estopped from litigating it.

If Armour, Plankington & Co. were not insured the libel must be dismissed, because the action is based on the theory that Armour, Plankinton & Co. were insured, and that by the payment of the loss under the insurance contract the libellants were subrogated to the rights of Armour, Plankinton & Co.

Again, if Charles E. Wager, the claimant and appellant, was insured the libel must be dismissed, because the libellants, having paid the loss under the terms of the insurance policy for the benefit of the insured, are estopped from recovering it back from the insured ; and if the Court should find that both H. Morse & Co. and Charles E Wager were insured, then the libel must be dismissed for the same reason.

FOURTH.

Libellants having paid the loss under the policy, are deemed in law to have waived the right to claim now that the loss arose under the exceptions contained in the policy.

The learned District Judge, in his opinion, says: "It is not material to the carrier, according to the authorities, with whom he litigates the question of negligence, and the insurers in settling and paying such doubtful claims are not mere volunteers."

The Monticello, 17 How., 152, 155.
Ins. Co. vs. The C. D., Jr., 1 Woods, 72 : The Sun Mut. Ins. Co. vs. Miss. Val. Trans. Co., 17 Fed. Rep. 919.

And the learned Circuit Judge, in his opinion, says: "Treating the case as though Armour, Plankington & Co. were libellants, their right to recover against the vessels would not be effected by the fact that they had been paid the full amount of their loss by the insurers (The Monticello, 17 How. 125)."

The proposition which we now maintain is that the insurance company, if they are subrogated to any rights against any one, it must be to rights *accruing under the policy ;* that if they are not subrogated to rights *under* the policy, then there is *no subrogation at* *all*, because if it were otherwise, then *any one might pay the loss and claim subrogation* against the carrier. That there is no such thing known to the law as the paying of a loss by an insurance company, *under* its policy, and then saying afterwards in a suit, in which it claims subrogation, that the loss occurred *outside of the conditions expressed or within the exceptions contained* in the policy of insurance, and that, therefore, the policy of insurance did *not* attach ; for the very moment the company states that the loss occurred by reason of one of the *exceptions* contained in the policy (unless that exception is waived, and the company has the right to waive it), it must *necessarily admit* that the loss did not occur *under the policy*, or, in other words, that the policy did *not cover that particular loss or the loss* caused by that particular act, and therefore any payment which it makes where there is no waiver necessarily, is simply a *voluntary* one of no more force than if made *by a stranger*. And if there is a waiver, as there necessarily must be if the company admits that the loss is under the policy and not included in any of the exceptions therein contained, then it is *estopped* from claiming in its action against the carrier that the loss occurred within one of the exceptions contained in the policy, as for instance, in this case, the alleged negligence of the carrier. The three cases referred to in the extracts from the above opinions certainly do not hold the contrary view.

In the case of the Monticello, 17 How., 152, 155, the defense set up in the answer was, that the respondents had received satisfaction from the insurers, and the Court held that this he could not do. The question was not raised whether the loss was one *within the exceptions contained in the policy ;* on the contrary, it was *not denied* that the loss arose directly *under the policy*, and was paid by virtue thereof.

The case in 1 Woods, 72, contains a very meager statement of the facts. All that there is upon the subject is as follows : " The respondents further claim that having shown by the testimony, as they allege, that the insurance company was not legally bound to indemnify the insured for the loss the latter sustained by the collision, therefore the libellants have no cause of action against the respondents, although they have paid the loss. But I am of the opinion that the authorities are adverse to this claim, and adopt the conclusion of the District Judge, and refer to the case of Monticello vs. Mollison, 17 How., 152."

It does not appear from that statement whether the insurance company did or did not waive the benefit of any defence it might have to an action against it on the policy. The presumption, however, is that it did, as this decision is based wholly upon 17 How., 152, which certainly does not hold the contrary.

The last case, Sun Mut. Ins. Co. vs. Miss. Val. Trans. Co., 17 Fed. Rep., 919, in reality substantiates the views and propositions hereinbefore laid down. In that case the goods lost through the negligence of the respondent, were insured under a policy of insurance which read : "From St. Louis to New Orleans." A part of the goods were in St. Louis, and another part in East St. Louis, on the opposite side of the river. The defendant placed those that were in St. Louis upon the barge, and then employed the tug which did the damage to carry the barge with those goods in it over to East St. Louis, there to place on board the portion of the cargo in store there, and to return to the St. Louis levee for the final start to New Orleans. After taking on board the barge the goods at East St. Louis, and starting back across the river the collision complained of occurred. Upon these facts it was insisted that as to so much of the cargo as was taken on board at East St. Louis the insurance company was not liable, because that property was not *en route* from St. Louis to New Orleans at the time of its loss. It was said that inasmuch as the insurance company was not liable on its policy it could not by paying the loss acquire any right of subrogation. On page 923 the Court says: "The question whether the voyage from St. Louis to New Orleans was commenced within the meaning of the policy of insurance so as to make the insurers legally liable may admit of some doubt. However, I am, as will presently appear, strongly inclined to the opinion that it had. Waiving, however, this question for the present, I hold *that, since the insurance company in this saw fit to waive the objection and treat the loss as within the policy by paying it,* the carrier cannot be heard to object."

The principle established in the opinion last cited is exactly what we contend for, namely, that the insurance company has the right *to treat the loss as within the policy* by paying it, and thereby *waive* the benefit of any defense or objection it otherwise might successfully interpose. And it does not lie in the mouth of the trespasser, who is a third party, to say that the insurance company should not have waived any such defense or objection, but the insurance company has *not the right to waive the objection and treat the loss as within the policy by paying it, and then to turn around and seek to recover from the trespasser damages it claims were brought about by causes* not *within the policy and which it must necessarily have waived when it paid the loss.*

LASTLY. The learned Circuit Judge erred in finding on the evidence that the damages resulted from the negligence of the master of the steam canalboat "Sydney." The evidence, as shown by the record, shows that the loss was brought about without any negligence on the part of the master and crew of the steamboat "Sydney." Explosion of boiler is not evidence of negligence.

51 N. Y., 476.
33 N. Y. State R., 287.

The Court has Jurisdiction.

The libel herein was filed in the District Court of the United States for the Southern District of New York July 18th, 1883, whereupon the appellant, as master and owner of said steamboat, appeared and filed claim thereto, as owner, and made answer to the libel. Under orders duly filed in the U. S. District Court for the Southern District of New York, the said steam canalboat "Sydney," was sold by the marshal, and the proceeds thereof, two thousand one hundred dollars, were paid into the registry of said Court, to abide the event of this suit, and a stipulation for one thousand dollars, the agreed value of the said boat "Worden" was duly filed in said Court by the appelpellant, making the value of the *res* libelled herein, as found by sale and agreement, three thousand one hundred dollars. Thereafter the cause was tried in the District Court and a decree entered dismissing the libel. Thereupon the libellants appealed to the Circuit Court of the United States for the Southern District of New York; and therein the decree of the District Court was reversed and a decree entered in favor of the libellants for the sum of six thousand one hundred and seventy-five $\frac{89}{100}$ dollars, exclusive of costs and interest. From this decree an appeal was taken to this Court and duly allowed and perfected, and the usual citation issued.

This Court is asked to dismiss the appeal on the alleged ground that the matter in dispute is less than five thousand dollars.

The appellant was the sole owner and master of the *res*, viz., the steam canalboat "Sydney," and canalboat "William Worden," before and at the times of the occurrence of the damages for which this suit is brought. The appellant so alleges in the claim and answer, verified by him in person (Respondent's Motion Papers, pp. 7 and 13). At the trial in the Circuit

Court the appellant testified that he bought the said steamboat on Nov. 18th, 1882, and that he ran said steamboat, as owner and master thereof, from said date down to and including the times of the occurrence of and damages for which this suit is brought (Record, pp. 111 and 114). The learned Circuit Judge finds the claimant to have been the owner (Finding Seventh).

In the stipulation between the respective proctors, filed herein on the motion, it is admitted that the claimant and appellant Charles E. Wager was the sole owner of the said boats "Sydney" and "William Worden," during the voyage referred to in the libel herein and at the time of the alleged collision.

This stipulation is as follows: "It is hereby stipulated between the proctors for the respective parties herein that the following papers be printed on the motion of proctor for the appellees to dismiss the appeal to the Supreme Court in this action, viz.:

I. The libel.

II. The claim of owner of the "Sydney" and "Worden."

III. The answer of claimant.

IV. The bond for the value of the "William Worden" filed in the District Court.

V. The Marshall's return on the sale of the "Sydney."

VI. The decree of Circuit Court.

VII. The petition of appeal to the United States Supreme Court.

It is admitted that the claimant and appellant Charles E. Waner was the sole owner of the said boats "Sydney, and 'William Worden,' during the voyage referred to in the libel herein and at the time of the alleged collison.

HYLAND & ZABRISKIE,
Proctors for Claimant and Appellant
EDWARD D. MCCARTHY."

The appellee respectfully urges that he has been properly permitted to appeal to this Court on the ground that, as it appears in the record that he was the sole owner and master of the said vessels at the time of the collision, and at the time of making claim thereto in the District Court, the decree in the suit *in rem* binds him personally as *res judicata*, that a libel *in personam* against him would lie to execute that decree, and that the matter in dispute in this case is not the vessels, or the existence of a lien on them, but the amount of the decree, viz.: six thousand one hundred and seventy-five $\frac{89}{100}$ dollars, exclusive of the costs of the Circuit Court.

It is respectfully submitted that under the facts stated the matter in dispute exceeds the sum or value of five thousand dollars, exclusive of costs as required by Sec. 3, Act of Feb. 16, 1875, Chap. 77, 18 Stat., 316.

"The practice of the Admiralty Court is not to render a decree *in personam* on a libel *in rem*, but in the case proved shows a clear right to a recovery against the person (whether the action *in rem* is sustainable or not), the libellant will be permitted after decree to introduce the proper allegations *in personam* and proceed thereon, and *after such steps have been taken the Court will hear and adjudicate the matter upon the proofs already before it*, or upon the hearing of such further evidence as either party may be allowed on motion or petition to introduce."

Betts' Ad. Pr., 99.

The above rule was followed by Judge CURTIS in the case of the "Enterprise" 2 Curtis, 317. The learned Judge holds that the decree in the suit *in rem* bound the claimant personally as *res judicata;* that a libel *in personam* against the claimant would lie to execute the decree *in rem*, it appearing in the record that the claimant of the vessel was the owner of her during the voyage for which the wages sued for were claimed, and that by his answer he contested in that character the right to wages. It will be remembered that the proceeds of the sale of the vessel in this case after deducting costs were thirteen $\frac{90}{100}$ dollars. The decree, however, was for more than fifty dollars. An appeal was allowed to the Circuit Court on the ground that as the Court could proceed in a libel *in personam* against the claimant to execute the decree *in rem*, the matter in dispute was the decree for over fifty dollars and not the value of the *rem*, viz.: thirteen $\frac{90}{100}$ dollars, exclusive of costs. This case, it is respectfully submitted, is exactly in point and has not been overruled.

Rule 13 in Admiralty, under which the above suit was brought, provides that "In all suits for mariner's wages the libellant may proceed against the ship, freight and master, or against the ship and freight, or against the owner or master alone *in personam*." This rule does not materially differ from Rule 15 in Admiralty, under which this suit is brought, viz.: "In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*." The only difference between these two rules is that in the former the libellant may proceed against the freight with the ship and master, and in the latter against the ship and master, exclusive of freight. Therefore, in principle the two rules are precisely alike, so far as they apply in this case; that is, in neither case could the owner and ship be joined. Hence, it is an exactly parallel case in principle with the case at bar. *In the case at bar the appellant as owner and master can as master be joined.*

In the case of "Jesse Williamson, Jr.," 108 U. S., 311, the learned Justice BLATCHFORD in his opinion cites the case of the "Enterprise" and draws a clear distinction between it and the case of the "Williamson." There did not appear in the record of the "Jesse Williamson" "anything which could be held to establish, as against the claimants of the vessel, though they were her owners when the claim was filed, that they were her owners at the time of the collision, and so in a position to be liable to respond *in personam* for the damages suffered by the libellant, in a proper proceeding *in personam*." The learned Justice further clearly lays down the rule of practice that, although "Rule 15, in admiralty, provides that "in all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*, this rule, as is well settled, excludes the joining in one suit of the vessel and her owners; *but it does not prevent the introduction into the libel of allegations as to the ownership of the vessel at the time of the collision, with a view to a proceeding to obtain such ultimate relief in personam, on the basis of a recovery in rem, as the libellant may be entitled to.*"

It is, therefore, clear that the matter in dispute in this case is the amount of the damages as found in the Circuit Court, since, upon the record, a libel *in personam* against the appellant would lie to execute any portion of the decree herein unsatisfied after exhausting the value of the *res* in court.

By referring to the libel and complaint of the respondents it will be observed, first, that the claim of damages is nine thousand two hundred and eleven $\frac{75}{100}$ dollars, and that the libellants ask not only that the said vessels be condemned and sold, but also that "all persons having or claiming to have any right, title or interest in the same may be cited to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree *the payment of the claims aforesaid*, with interest and costs, and that said vessels, their tackle, etc., may be condemned and sold to pay the same, and *that your libellants may have such other and further relief in the premises as in law and in justice they may be entitled to receive.*" It follows from this prayer that the libellants have laid the foundation to take any proceeding which will enable them to procure, not only the condemnation and sale of the *res*, but the amount of their damages, viz., nine thousand two hundred and eleven $\frac{75}{100}$ dollars. a new action would not have to be brought to enter judgment against the appellant *in personam*, but, upon the proper application to the Court, a decree would be entered against the appellant *in personam* and execution issue thereunder, on giving proper notice to the appellant, to satisfy any balance of judgment unpaid after exhausting the *res*. This would be in the nature of supplementary proceedings.

The libellants could have appealed to this Court from a judgment of dismissal of their libel. The rule is clear that, in actions of tort, the amount claimed in the declaration will determine jurisdiction on plaintiff's appeal. On the record in this Court, had an objection been made to the jurisdiction of the Court in case the libel had been dismissed and an appeal taken, the libellants could clearly have argued that, as the claimant was the owner and master of the vessels at the time of the occurrence of the injuries, he would be liable for any deficiency, after exhausting the value of the *res* in Court, and it would not lie in the mouth of the appellant to deny it, as he had set up the fact of his ownership in the answer, and had contested in that character the right to damages. Hence, under the rule laid down in the case of the "Enterprise," referred to by the learned Justice BLATCHFORD, the respondents could have appealed in case their libel had been dismissed.

The case of Elgin vs. Marshall, cited by the learned advocate for the respondents, is clearly distinguishable from the case at bar. The amount involved in that case was nothing more or less than one thousand six hundred and sixty $\frac{75}{100}$ dollars, interest due on coupons, detached from the bonds. Clearly, under the statute, the Court could not take cognizance of the collateral effect of such a decision, as the bonds themselves were not in the suit and could not be passed upon as such in the suit, and the Court was clearly right when it would not proceed in any case unless its right and duty to do so are apparent on the face of the record.

Again, the fact that the libel contains no allegation of ownership of the offending vessels does not militate against the principle involved in the case. That would not prevent the libellants from making such amendments as would be in keeping with the facts brought out on the trial of the case, and the Admiralty Court would clearly allow the amendment of the record in conformity with the facts, in order to enable the libellants to satisfy their decree. Further, the appellees have made use of the admission of the appellant in his answer. They have procured a decree *in personam* against the appellant Wager, as shown by the affidavit of J. A. Hyland herewith submitted, and have not failed to take advantage of every right which the law and practice of the Courts gave them. Nor was the admission that the appellant was *master* and *owner* of the boat at the time of the collision superfluous; on the contrary, it was essential to make the allegation as a fact, as it would have weight with the Court to show that the appellant would naturally be diligent in performing his duties, because he was interested in the outcome of the voyage as owner of the vessels.

The fact is clear, and cannot be controverted, that the respondents in this case, should they succeed, will secure a judgment for six thousand one hundred and seventy-five $\frac{89}{100}$ dollars, exclusive of costs and interest, and can, after exhausting the *res*, proceed against the appellant *in personam* for the balance of said decree. Therefore it must be admitted that the amount involved is over five thousand dollars, exclusive of costs. The case of the "Enterprise" is exactly in point, and has not been overruled, but, on the contrary, has been cited by the learned Justice BLATCHFORD in his opinion in the case of the "Williamson" and approved.

LASTLY.

The judgment appealed from should be reversed, and libel dismissed with costs.

Respectfully submitted,
J. A. HYLAND,
Proctor for Claimant and Appellant,
No. 45 Broadway,
N. Y. City.

Office Supreme Court U. S.
FILED,
FEB 19 1891
JAMES H. McKENNEY

UNITED STATES SUPREME COURT.

IN ADMIRALTY.

No. 224.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY ET AL.,
Libellants and Appellees,

vs.

THE STEAM CANAL BOAT "SYDNEY," &c.,
CHARLES E. WAGER,
Claimant and Appellant.

AFFIDAVITS OF J. A. HYLAND IN OPPOSITION TO MOTION TO DISMISS APPEAL.

HYLAND & ZABRISKIE,
Proctors for Claimant and Appellant,
No. 45 BROADWAY,
New York City.

C. G. Burgoyne, 146-150 Centre Street, New York.

the respondents in this case, should they succeed, will secure a judgment for six thousand one hundred and seventy-five $\frac{89}{100}$ dollars, exclusive of costs and interest, and can, after exhausting the *res*, proceed against the appellant *in personam* for the balance of said decree. Therefore it must be admitted that the amount involved is over five thousand dollars, exclusive of costs. The case of the "Enterprise" is exactly in point, and has not been overruled, but, on the contrary, has been cited by the learned Justice BLATCHFORD in his opinion in the case of the "Williamson" and approved.

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C. G. Burgoyne, 146-150 Centre Street, New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY ET AL.,
Libellants and Appellees,

vs.

The Steam Canalboat "Sydney," &c., CHARLES E. WAGER,
Claimant and Appellant.

STATE OF NEW YORK,
Southern District of New York, } ss.:

J. A. HYLAND, being duly sworn, deposes and says that he is one of the proctors for the claimant and appellant in the above-entitled suit. That, when the libel was filed in the District Court of the United States for the Southern District of New York, deponent was retained and duly appeared as the proctor of record in said Court for this appellant. That the claim, answer and stipulation, filed in said Court by the appellant, were prepared by deponent and were signed and sworn to by Charles E. Wager, the appellant. That at the time of filing said claim, answer and stipulation Charles E. Wager, the claimant and appellant herein, was the owner of said steam canalboat "Sydney" and said canal boat "William Worden." That thereafter, on the trial in the Circuit Court of the United States for the Southern District of New York, the appellant, Charles E. Wager, was sworn and examined by deponent as a witness in his own behalf on or about the 13th day of May, 1886. In that examination the appellant, Charles E. Wager, swore as follows :

" Q. Mr. Wager, you are the claimant in this case ?

" A. Yes.

" Q. And you were the captain of the boat 'Sydney' at the time of this disaster ?

" A. Yes.

" Q. And commanded both boats coming down the river ?

" A. Yes, sir. (Fol. 184, p. 46, Additional Testimony taken in behalf of Claimant in Circuit Court.)

" Q. When did you buy this boat or get her ?

" A. I bought this boat in September ; I have it on my book here (witness looks at book) November, 1882.

" Q. From whom did you buy her ?

" A. From Gillespie." (Fol. 210, p. 53, Claimant's Additional Testimony.)

The learned Circuit Judge WALLACE found as a matter of fact that, "at the time of making application for the insurance, receiving the certificate and signing the usual bills of lading, it was understood between Morse & Company and the claimant that the latter " (that is, Capt. Charles E. Wager, the appellant) " owned the 'Worden' and the 'Sydney' and intended to tow the 'Worden' by the 'Sydney' on the voyage " (Judge WALLACE's Opinion, Finding Seventh). That the stipulation hereto annexed, marked "Exhibit A," and made a part of this affidavit, was duly entered into between the proctors of the respective parties, in which it is admitted that the appellant, Charles E. Wager, was the sole owner of the said boats " Sydney " and " William Worden " during the voyage referred to in the libel herein and at the time of the alleged collision. That the appeal to this Court was duly taken and allowed, and the notice and petition of appeal duly filed within the time prescribed by law and the consents of libellants' proctors, and that the bond on such appeal was duly given and filed, and approved by Mr. Justice BLATCHFORD, of this Court, and the usual citation and supersedeas issued thereon by said Justice, all of which were duly served on libellants' proctor, within the time prescribed by law, and which now remain on record in this Court.

J. A. HYLAND.

Subscribed and sworn to before me this 18th day of November, 1887.

DANIEL J. AUGUSTINE,
Notary Public,
N. Y. Co.

[SEAL.]

Exhibit "A."

SUPREME COURT OF THE UNITED STATES.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY ET AL.,
Libellants and Appellees,

vs.

The Steam Canalboat "Sydney," her Engines, &c., and the Canalboat "William Worden," her Tackle, &c., whereof CHARLES E. WAGER is
Claimant and Appellant.

It is hereby stipulated between the proctors for the respective parties herein that the following papers be printed on the motion of proctor for the appellees to dismiss the appeal to the Supreme Court in this action, viz :

I. The Libel.

II. The claim of owner of the "Sydney" and "Worden."

III. The answer of claimant.

IV. The bond for the value of "William Worden," filed in the District Court.

V. The Marshal's return on the sale of the "Sydney."

VI. The Decree of Circuit Court.

VII. The petition of appeal to the U. S. Supreme Court.

It is admitted that the claimant and appellant Charles E. Wager was the sole owner of the said boats "Sydney" and "William Worden" during the voyage referred to in the libel herein and at the time of the alleged collision.

HYLAND & ZABRISKIE,
Proctors for Claimant and Appellant.

EDWARD D. MCCARTY.

SUPREME COURT OF THE UNITED STATES.

THE PROVIDENCE WASHINGTON INSURANCE CO. and THE SECURITY INSURANCE CO.,
Libellants and Appellees,

vs.

The Steam Canalboat "Sydney" and Canalboat "William Worden," whereof CHARLES E. WAGER is
Claimant and Appellant.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:
CITY AND COUNTY OF NEW YORK,

JOSIAH A. HYLAND, being duly sworn, deposes and says that he is the proctor for the claimant of the vessels above named. That on or about the 7th day of May, 1887, the libellants above named commenced an action in admiralty in the District Court of the United States for the Northern District of New York, against the above-named claimant, Charles E. Wager, with whom were impleaded Henry Morse and Alanson Morse, in which action said libellants sought to recover from the said respondents the sum of $9,211.75. That said suit was based upon the same state of facts as contained in the libel in the present action. That issue was duly joined in said suit by the filing and service of the answers of all the respondents, and thereafter the said action came on for trial before the Hon. ALFRED C. COXE, Judge of the said District Court, and was tried on the 24th day of April, 1888. That in said action the said District Judge filed an opinion, copy of which is annexed hereto, marked Exhibit A, and made a part hereof. That in pursuance of Judge COXE's opinion, judgment was entered in the said District Court on the 17th day of August, 1888, in favor of said libelants against all of said respondents, the amount of judgment against said Charles E. Wager being $6,175 damages, and $117.16 costs, amounting in the whole to the sum of $6,292.16, which decree bears date August 13, 1888.

That, thereafter all of said respondents duly appealed from said judgment to the Circuit Court of the United States for the Northern District of New York, where said appeal was heard and argued on the 15th and 16th days of January, 1889, before Hon. WILLIAM J. WALLACE, Judge of the said Circuit Court.

That on or about the 22d day of February, 1889, the said Circuit Judge made and filed an opinion in writing, copy of which is annexed hereto, marked Exhibit B, and made a part hereof. That after and in pursuance of the said opinion and decision of the Circuit Judge, and on or about the 18th day of April, 1889, a final decree was entered in said action, reversing the said judgment as to the respondents Henry Morse and Alanson Morse, and dismissing the libel as to them, and further decreeing agaist the said Charles E. Wager the sum of $6,175.89 damages, $2,153.32

interest, making a total of $8,329.21, together with $117.16 costs, as taxed in the District Court, and $75.30, costs of the said Circuit Court, copy of which final decree is annexed hereto, marked Exhibit C, and made a part hereof.

That thereafter, and on or about the 7th day of June, 1889, the said Charles E. Wager duly appealed from said final decree (Exhibit C) to the United States Supreme Court, the record on which was thereafter transmitted to said United States Supreme Court, and the said appeal is now pending therein and is docketed as No. 1474 for the October Term, 1889.

Deponent further states that on the trial of the said suit *in personam* it was claimed by the proctor for the libellants herein, who was also the proctor for the libellant in said suit, that the decree was *res adjudicata* and was binding upon the said District and Circuit Courts, and introduced in evidence in said suit the final decree appealed from herein, as will more fully appear by reference to the said record now on file in this Court, and both the District and Circuit Courts substantially held, on the trial of said action, that said decree was binding and conclusive upon them.

J. A. Hyland.

Sworn to before me this 29th }
day of January, 1891. }

Daniel J. Augustine,

Seal. Notary Public,
N. Y. Co.

Exhibit A.

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF NEW YORK.

THE PROVIDENCE WASHINGTON INS. CO., &C., and the SECURITY INS. CO., &C.

vs.

HENRY MORSE, ALANSON MORSE and CHARLES E. WAGER.

COXE, J.:

In May, 1883, the libellants insured a cargo of grain owned by Armour, Plankinton & Co., which the respondents agreed safely to transport from Buffalo to New York on board of the canalboat "Worden," propelled by the steam canal boat Sydney. The cargo having been lost *in transitu*, the libellants paid the loss to Armour, Plankinton & Co., the insured parties, and, being subrogated to their rights, bring this libel *in personam* against the respondents as common carriers. The libellants have heretofore obtained a degree *in rem* against the boats. The facts fully appeared in *The Sydney*, 27 Fed. Rep., 119, 23 Fed. Rep., 88, and *Insurance Co. vs. Wager*, *post*, 364.

It is thought that the decison of the Circuit Court is conclusive of this action. *The Sydney*, 27 Fed. Rep., 119. Some additional testimony has been taken, but the facts are not materially changed. In the language of one of the briefs submitted by respondents, "the theory of the libel *in rem* against the "Sydney" and the libel *in personam* at bar is the same." There is no way fairly to distinguish the two cases. In the light of this controlling authority the situation is a simple one. Armour, Plankinton & Co., as owners, had a cause of action against the respondents as common carriers. Armour, Plankinton & Co. were alone insured as owners of the cargo. By paying them the libellants were subrogated to all their rights. Morse & Co., as carriers and advancers, were alone insured, but it was for $520, only the extent of their actual pecuniary interest in the cargo.

The considerations now urged by the respondents may properly be presented to the Circuit Court on appeal, but it is thought that this Court cannot with propriety consider them. It follows that the libellants are entitled to a decree for the amount agreed upon at the trial with costs.

Exhibit B.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY ET AL.,
Appellees,

AGAINST

MORSE ET AL.,
Appellants.

WALLACE, J.:

As stated in the opinion of Judge COXE in the District Court in this case, the facts are essentially the same as those which appeared in the case of the "Sydney." The testimony as to conversations about the insurance which took place in 1883, and were not brought to light in the former litigation between the parties, is entitled to slight consideration. The District Judge, however, has misapprehended the purport of the opinion in the case of the "Sydney" respecting the extent to which the benefit of the insurance inured to Morse & Co. They were insured for their whole interest in the cargo, not merely to the extent of their interest in the freight, but as carriers who had contracted for the safe delivery of the cargo. Consequently they are entitled equally with Armour, Plankinton & Co. to the benefit of any payment by the insurers on account of the loss, and there can be no recovery against them upon the theory of subrogation.

(A true copy.)

Attest:
W. J. DOOLITTLE,
Clerk.

Exhibit C.

At a Stated Term of the Circuit Court of the United States for the Northern District of New York held at the United States Court Rooms in the City of Albany, on this 15th day of January, 1889.

Present—HON. WILLIAM J. WALLACE, Circuit Judge.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY, of Providence, Rhode Island, and THE SECURITY INSURANCE COMPANY, of New Haven, Connecticut,
Libellants and Appellees,

VERSUS

HENRY MORSE, ALANSON MORSE and CHARLES E. WAGER,
Respondents and Appellants.

Appeal No. 176.

The above-entitled cause having been duly heard on the appeal of the above-named respondents and appellants from the final decree of the District Court of the United States for the Northern District of New York, bearing date on the 13th day of August, 1888, and entered in the office of the Clerk of said District Court on the 17th day of August, 1888, on the pleadings and proofs in said District Court; and said appeal having been argued by the advocates for the respective parties, and due deliberation being had in the premises in accordance with the findings and conclusions of the Court herein duly filed with the Clerk of this Court; it is now hereby

Ordered, adjudged and decreed by the Court that, as to the respondents and appellants, Henry Morse and Alanson Morse, the decree of the said District Court herein be reversed and the libel herein of the said libellants and appellees be and the same is hereby dismissed upon the merits, and that the said libellants and appellees take nothing thereby against said Henry Morse and Alanson Morse. And it is further adjudged and decreed that the said appellants Henry Morse and Alanson Morse do recover of and from said libellants The Providence Washington Insurance Company of Providence, Rhode Island, and the Security Insurance Company of New Haven, Connecticut, the sum of two hundred twenty-six and $\frac{57}{100}$ (226.57) dollars, their costs and disbursements in the District and Circuit Courts as taxed.

And it is further hereby ordered, adjudged and decreed that the decree so appealed from be and the same hereby is affirmed with costs of both courts as against the appellant and respondent Charles E. Wager, and that the said libellants and appellees The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, do recover herein of and have judgment against said appellant Charles E. Wager for the sum of six thousand one hundred and seventy-five and $\frac{89}{100}$ (6,175.89) dollars, together with the interest thereon from the 28th day of May, 1883, amounting to the sum of two thousand one hundred and fifty-three $\frac{32}{100}$ (2,153.32) dollars, together amounting to the sum of eight thousand three hundred and twenty-nine and $\frac{21}{100}$ (8,329.21) dollars; and together with the sum of one hundred seventeen and $\frac{16}{100}$ (117.16) dollars, their costs as taxed in the District Court, amounting in the aggregate to the sum of eight thousand four hundred forty-six and thirty-seven hundredths ($8,446.37) dollars; and Alanson Morse and John Fero having become sureties for said Charles E. Wager for all costs which should be awarded against him, the said Charles E. Wager as such appellant herein, if he should fail to make his appeal good, it is further adjudged and decreed that said libellants and appellees do recover their costs in the Circuit Court, taxed at seventy-five and thirty-onehundredths ($75.30) dollars, of said Charles E. Wager, and that a summary judgment for said amount of taxed costs in the Circuit Court be, and the same is hereby, entered against said Alanson Morse and John Fero, sureties and stipulators, for the costs as aforesaid.

And it is further ordered, that unless an appeal be taken from this decree within twenty days from the entry thereof and service of a copy of the same on the the proctors for the libellants and appellees and of the respondent Charles E. Wager, the said Henry Morse and Alanson Morse have execution according to law and the rules and practice of the Court to enforce the satisfaction of their costs aforesaid, and the libellants have execution against said Charles E. Wager for said amount decreed to be paid by him as aforesaid and against said Wager and his said sureties and stipulators, for said costs of this Court taxed as aforesaid.

WM. J. WALLACE.

We hereby waive notice of settlement of the foregoing decree.

March 28, 1889.

HYLAND & ZABRISKIE,
Proctors for Charles E. Wager.
EDWARD D. MCCARTHY,
Proctor for Libellants.

March 29th, 1889.

Office Supreme Court U. S.
FILED,
MAR 2 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

The Steam Canalboat "SYDNEY" her engines, &c., and the Canalboat "WILLIAM WORDEN" her tackle, &c., CHARLES E. WAGER,

Claimant-Appellant,

vs.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY and THE SECURITY INSURANCE COMPANY

Libellants-Appellees.

BRIEF

ON BEHALF OF LIBELLANTS AND APPELLEES.

EDWARD D. McCARTHY,

Proctor for Libellants and Appellees.

Supreme Court of the United States.

The Steam Canalboat "SYDNEY," her engines, &c., and the Canalboat "WILLIAM WORDEN," her tackle, &c., CHARLES E. WAGER,
Claimant-Appellant,

vs.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY and THE SECURITY INSURANCE COMPANY,
Libellants and Appellees.

On jurisdiction, the following points are submitted:

(I.)—The action is *in rem;* and the amount, in controversy, is limited to the value of the subject of the maritime lien.

The aggregate value of the two vessels, Sydney and Worden, condemned to satisfy the lien, was less than five thousand dollars.

Elgin *vs.* Marshall, 106 U. S. R., 578.
The Jessie Williamson, 108 U. S. R., 310.
Hilton *vs.* Dickinson, " "
Gray *vs.* Blanchard, 97 U. S. R., 564.

(II.)—That judgment was finally entered, (and this is true), for an amount greater than the value of these vessels, is immaterial, seeing that nothing was bound by the decree, except the subject to which the lien inhered. Even the claimant of the vessels, who admitted that he was their owner, was not bound by it, beyond the scope of material facts.

But the only facts, which are material to a judgment, *in rem*, are those which declare the lien, and the jurisdiction of the Court. It is an immaterial question, who is owner ; or how great the loss, for which the lien is asserted

(III.)—Such a decree, or judgment, will have probative force in any subsequent action, *in personam*, only over the material, and necessary, facts on which the lien reposed ; and it may have probative force against all persons, irrespective of the filing of a claim.

(IV.)—Therefore, in any subsequent action, *in personam*, the claimant, or owner, or any person proceeded against, will be bound to a limited extent (if at all), by this decree ; he can contest a personal liability, and can offer evidence to show that the damages were less.

For this, and other reasons, it was held in Elgin *vs.* Marshall (*supra*), that the sum, or value, in controversy, was not increased by the consideration of its effect upon subsequent cases.

(V.)—If an action, *in rem*, were conceivable, on whose decree an execution might issue, *in personam*, to recover the difference between the amount of damages sustained, and the value of the lien-object, then the amount in controversy, it is conceded, would be the damages sustained, irrespective of the value of the property attached.

Such is not this case ; another action must be brought in order to recover a residue of damages, and in such action the present record would be evidence, merely; and evidence of a limited scope.

(VI.)—It was suggested in the case of the Jessie Williamson, (108 U. S. R., 305), that *if the libel, in rem*, were to name the person, or persons, who owned the attached vessel; and were to make a claim, on him, or them, for the damages sustained, the sum so claimed might be considered as the amount in controversy.

If it were urged that this respectable *dictum* was not in harmony with the previous decision in Elgin *vs.* Marshall, because, in the case supposed, the decree, *in rem*, would still have probative force only, would conclude no one, not even the alleged owner, from showing, in a subsequent action *in personam*, that he was not owner, or that the damages were not more than nominal: we do not here need the aid of these considerations; because our libel made no such allegation, neither did it claim fixed damages. It did no more than assert a lien against the offending vessels, and the only material facts, which it presented, were those out of which the lien arose.

(VII.)—But the appellant will insist, that since the answer *alleges ownership in the nominal claimant of record*, he is effectually bound by the decree, in its full extent. We reply:

First.—All that was said, in the case of the Jessie Williamson, was, "That the liability of the claimants "for the totality of loss could only be conceded in a "case where the claimants were alleged (by the Libel) "and shown to have been the owners of the vessel sued "at the time of the collision" (P. 310).

It does not hold, authoritatively, that such liability would exist, even in the circumstances supposed. (If it had done so, it would have dissented from the case of Elgin *vs.* Marshall.)

But our libel (as before submitted), contains no such allegation; and the evidence nowhere shows that the claimant was owner at the time the loss arose. The claimant did not testify.

Second.—The admission, in the answer, of the claimant's ownership, does not make an issue, nor change the nature of the proceeding, as one exclusively *in rem*, nor lay the foundation for testimony.

The claimant's admission was immaterial and superfluous; it neither injured, nor benefited, either party.

Third.—Because this admission was superfluous, it would not have estopped the claimant, had he been subsequently sued, *ex eadem causa*, from showing that it was untrue.

Neither words, nor acts, however false, will estop their author from showing the truth, if they have not been done, or spoken, to the prejudice of his adversary.

Dazell *vs.* Odell, 3 Hill, 321.

Fourth.—An action, *in rem*, derives its character from the libel, solely. What the answer alleges, except as responsive to the libel, is nothing. The same allegation might, and often does, appear in the claim, and thus become a part of the record. It might be admitted by the claimant, in his testimony. Nevertheless, the libellant gets nothing from an action, *in rem*, excepting the condemnation of the thing proceeded against. He can get no more, although the claimant is ever so willing.

VIII.—The right of appeal is a reciprocal right, between adverse parties.

Hilton *vs.* Dickinson (108 U. S. R., 174).

A statute will not be so construed, in the absence of a clear expression, *contra*, as to give one party a favor, which would be denied to his opponent.

Now it is clear, and it would have been so prior to the case of Elgin *vs.* Marshall, that we could not have appealed to this Court, had our libel been dismissed by the Circuit Court.

First.—Although our action is *ex delicto*, and was brought to recover damages; still, damages are not directly claimed, nor is a claim made against any person.

Second.—The libel only asserted a maritime lien against two vessels, and asked for their condemnation; and condemnation was a complete satisfaction of this demand.

In case of dismissal of this libel, how could we have shown that more than five thousand dollars had been in controversy?

Not by our libel, because this does not claim damages againt any one; neither could it have been the foundation of a judgment, *in personam*.

The only criterion, of the amount in controversy, would have been the ascertained value of the two attached vessels; and this was only thirty-one hundred dollars.

We could not, successfully, have contended that a right, *in personam*, arose from the facts set forth in our libel; and that the assertion of this right was cut off by the judgment of dismissal.

Both positions would have been wrong. A right, *in personam*, was not asserted by our libel, (*vide* the Jessie Williamson); and could not have been, (*vide* Elgin *vs.* Marshall); and no decree, *in rem*, can be an estoppel against a subsequent action, *in personam*, in its entirety.

The utmost to be said is, that the record in the real action might have probative force, to some extent, in the personal action.

(But it is not apparent that this would be true ; and the concession has heretofore been made for argument's sake only. We might urge, if it were necessary, and with some show of reason, that a decree, *in rem*, is conclusive on no one, for any purpose, in a subsequent personal action.)

So we repeat, that an appeal, on our part, would have been dismissed, and that the appeal of the claimant is, *ex pari materia*, and ought to be *dismissed*.

This motion to dismiss was made on the third Monday of November, 1887 ; by order of the Court, of December 8th, its consideration was postponed till final argument came on.

On the merits, there is room to say little. The facts, established by the Circuit Court, indisputably sustain the conclusions of law; and it will not be an onerous task, to show that the testimony, with like assurance, supports the conclusions of fact.

A brief, but sufficiently comprehensive summary of leading points, will be permitted.

Certain persons, Henry Morse & Co., were carriers of a cargo of wheat from Buffalo to New York. This cargo was owned by Armour, Plankinton & Company. The agent of these owners was William Meadows, who resided in Buffalo.

On the trip to New York, the carrier's boat was managed so carelessly, that she was allowed to go aground, and become wrecked. The cargo, thereby, was totally lost.

Afterwards, these owners gave us a deed of cession of all their rights against the negligent carriers, as well as an assignment of their ownership in the salvage. (We had, already, as assignees, paid these owners the full amount in which the cargo had been covered. We had, also, paid Morse & Co. by the same cheque, the sum of $520, the value of their interest, as carriers, and advancers.

These facts being incontestably true, why was not the assurers subrogated to the owner's rights, one of which was the right to sue the carriers, personally, for damages, or to proceed, *in rem*, against the offending vessels ?

(I.) The following propositions were much controverted on the trials :

First.—Whether *the owners of the cargo* had been insured.

Second.—Whether *the carriers, Morse & Co.*, had been insured, *to the full value of the cargo.*

Third.—Whether *the boat-owner*, who was an employee of Morse & Company, had been insured to the full value of the cargo.

Because, if the affirmative of the first proposition is true, then the right of subrogation existed, and the assurers could have proceeded *in rem ;* or, they could have held Morse & Co., or their employee, the boat-owner, personally.

If the affirmative of the second proposition is true, then the assurers could have asserted a lien in the offending vessels ; or, they could have held the boat-owner personally.

If the affirmative of the third proposition is true, then the boat-owner, as well as his property, would have been free of liability.

Because, although guilty of negligence and liable to the cargo owners ; still, the assurers would have lost the right of subrogation, by the act of having insured the wrong-doer.

On the last named presumption, it is not clear that the principal carriers, Morse & Co., would have escaped liability to us; because they would have been responsible for their servant's acts, and it is not apparent that *his* exemption from liability, because he had been insured, would have exempted them, seeing that they could not assert any benefit from *his insurance*-contract.

(II.)—The Circuit Court found, as a matter of fact, that the owners of the cargo had been insured to the full extent of their interest, as owners, for the sum of $\$9,211\frac{75}{100}$, which was subsequently paid to them, as the persons assured; and that they then abandoned to the assurers. (Fols. 290, 291, 292, 298).

That Court also found that the assurers, at the same time, paid to Morse & Co., the carriers, the sum of $520 in full, for their interest in the cargo. (Fol. 298).

These conclusions of fact are well supported by the evidence.

Indeed, it is no challenge of truth to say, that no evidence exists to the contrary. The facts, on which these conclusions rest, were not disputed. Thus:

(I.)—When Meadows, the cargo owners' agent, applied to the carriers, Morse & Co., for transportation of the cargo, one condition which *he* made, and which *they* accepted, was, that Morse & Co., in consideration of $395, would carry the cargo to New York, *and get it insured.*

The payment of this sum, *which covered freight, and premium for insurance, was made a lien on the cargo.*

Vide, the testimony of Meadows, (Fols. 34–44, inclusive); and the testimony of Henry Morse, (Fols. 58–66, 71).

(II.)—It is to be remarked, that the certificate of insurance which had been issued pursuant to an open policy, held by the carriers, Morse & Co., was payable in $9,875.00. (Fol. 26).

Of this sum, $\$9{,}211.\frac{75}{100}$ was paid to the cargo owners, who receipted for it, and gave the aforesaid deed of cession. (Fols. 26, 28).

The residue, $520, was paid to Morse & Co., to satisfy their loss as carriers, and advancers. In consideration of this payment, Morse & Co. also gave a receipt, and a formal abandonment. (Fol. 27).

These facts, in connection with the testimony of Messrs. Meadows & Morse, already cited, clearly show that the contract of insurance covered two distinct interests:

First.—The owners, to the full value of the cargo.

Second.—The carriers, to the extent of their *direct interest as carriers and forwarders.*

(III.)—Hence it results, that the assurers were subrogated to the cargo-owners' right, and could maintain it against the offending vessels. They were also subrogated to Morse & Company's right against them, whatever that may have been.

And they could have brought a personal action, joint or several, for damages against Morse & Company, the principal carriers, and against their employer, the boat-owner.

The boat-owner, and claimant, herein, had no interest in the contract of insurance at all.

In the District Court, it was assumed that the boat owner payed, or agreed to pay, the premium for the accepted risk. *But this assumption is absolutely groundless.*

So far as appears, the claimant was ignorant that the cargo had been insured.

The Circuit Court found that the cargo-owners paid, or agreed to pay, the insurance premium, and subjected their property to a lien therefor. (Fols. 391-2).

This finding is confirmed by all the testimony. (*Vide* the citations, *supra*).

We admit, that if the boat-owner had paid, or agreed to pay, this premium, this fact would strenuously urge, that he had been insured, or was somehow covered.

But, *contra, how can one who is a total stranger to a contract, claim an adverse benefit in it?*

If the claimant neither made the contract, nor was burdened by any of its obligations, what benefit can he claim therein?

Why should he be allowed to cut off the assurers' right to subrogation?

Of course, there was one way in which the boat-owner could have cut off the right of subrogation; to wit, by independent contract, with the cargo-owner, that he should have the benefit of the latter's insurance.

Rantoul's Case, 21 Blatch., 439.
Phœnix Company's Case, 10 Biss., 19.
Caleb's Case, 20 N. Y., 73.
The Hadji, 20 Fed. Rep., 876.

Such an agreement will shut off the assurer's right, even though made without his knowledge. But it is an agreement which must be made a part of the bill of lading ; or, it must have a good consideration.

No such agreement was made by this claimant.

The following authorities declare the nature, and the scope, of the right of subrogation.

Mobile R. R. Co. *vs* Jurey, 111th U. S.R., 594 ;
Hall *vs.* R. R. Co.'s 13th Wall., 367 ;
Etna Ins. Co. *vs.* Taylor, 16th Wend., 3 ;
Hort *vs.* Western R. R. Corp. 13th Metc., 105 ; 67 Barb., 519 :
Phoenix Ins. Co. vs. Erie Transportation Co. 117 U. S. R. 312.

It was attempted to show that local custom, to wit, of the port of Buffalo, gave, or tended to give, the boatowner the benefit of the carrier's insurance.

In reply we submit :

(I.)—Custom, even though it were universal can not make personal contracts, or destroy them, when made.

It may be heard to explain, but not to change, a contract.

It can not bestow a consideration, when none exists ; it can not take away rights conferred by law, such, for example, as that of subrogation.

The Reeside, 2 Sumn., 569.
Bernard *vs.* Kellogg, 10 Wall., 390 ; 2 Comstock, 240.

(II.)—Local usage, if it exists, must be shown to be within the knowledge of the person, whose contract is to be affected by it. Now, Mr. Meadows says that he knew of no such custom, as that of giving the carrier the benefit of the shipper's contract of insurance.

(III.)—The testimony leaves it vague, and indeterminate, whether such a custom existed, or what it was. No one, reading the testimony, could tell in what way the custom of the port of Buffalo gives protection to the carrier, in such circumstances. The carrier himself (Morse), when asked how he was to be benefited by the contract, beyond his interest of $520, was unable to tell.

Certainly, custom cannot insure a carrier; nothing but *contract* can do that. Such a contention need not be seriously considered. And no proof is here, that any custom existed, whereby a cargo-owner became a trustee of the carrier, and lost all rights, to which his insurer might lawfully claim to be subrogated.

(IV.)—But, a *conclusive* argument on this head is, that every witness called by the carrier, as well as the carrier himself, testified that *no usage existed that would exempt the carrier from the consequences of his own negligence.*

(It is, however, untrue, that custom, could ever take away the right of subrogation; or could make one person the *cestui que trust*, of another person; or could give one the benefit of another's contract. There was no proof in behalf of claimant in the District Court, except that by some *shadowy* custom in Buffalo, or by some general "*understanding*," the carrier was to have the benefit of the owner's insurance.)

Look at it in any aspect whatever, if the carrier was guilty of negligence, he can take nothing by the contract of insurance. Neither does this conclusion seem to be a harsh one, in respect to the carrier.

Vide, the opinion of the Circuit Court (fol. 315).

The following is the finding of the facts of negligence by the Circuit Court, by reason of which the maritime lien arose :

"9."

"There is no evidence of any negligence on the part of the Werden or the Sydney, except that the steam boiler of the Synney was in an unsafe and unfit condition for the purposes of the voyage. The flues were weak, one of them burst, the steam escaped, all motive power was lost, and in consequence thereof the Werden was carried by the wind and tide upon the rocks. The boiler had not been thoroughly tested or examined since the preceding July.

Two or three days before the accident the boiler leaked steam upon the voyage commencing at Schenectady and continuing until the boat reached Troy.

At Troy the master of the Sydney caused repairs costing $3.50 to be made to the boiler, but no thorough examination or special test of the boiler was made to ascertain what its condition really was. The condition of the boiler was such that the defects existing would have been discovered if a thorough examination and test had been made. Shortly after the accident necessary repairs upon the boiler and engine were made which cost over $200."

This finding is supported by all the testimony in the case.